Supreme Court, U.S.
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No. 93-137

In The

Supreme Court of the United States

October Term, 1993

MOBILE HOME VILLAGE, INC., a Corporation of the State of New Jersey, t/a SOUTH WIND VILLAGE,

Petitioner,

vs.

MAYOR AND COUNCIL OF THE TOWNSHIP OF JACKSON, THE JACKSON TOWNSHIP RENT CONTROL BOARD, and THE ESTATE OF KURT H. AND SOPHIE BIELEFELOT,

Respondents.

On Petition for a Writ of Certiorari to the Appellate Division of the Superior Court of the State of New Jersey

BRIEF IN OPPOSITION FOR RESPONDENTS MAYOR AND COUNCIL OF THE TOWNSHIP OF JACKSON AND THE JACKSON TOWNSHIP RENT CONTROL BOARD

HIERING, HOFFMAN AND GANNON
Attorneys for Respondent Mayor and Council of the Township of Jackson
29 Hadley Avenue
Toms River, New Jersey 08753
(908) 349-1800

THOMAS G. GANNON
On the Brief

ABRAHAM S. BIELORY
Counsel of Record
BABCOCK, HENNES & BIELORY, P.C.
Attorneys for Respondent The Jackson Township Rent Control Board
2610 Yorktowne Boulevard
Brick, New Jersey 08723
(908) 255-6500

4132
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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QUESTIONS PRESENTED

The two issues presented by Mobile Home Village, Inc. for review by this Court on Writ of Certiorari are inappropriate under the standards set out in Rule 10 of the Supreme Court Rules. The first issue is of no distinction since the holding of *Yee v. City of Escondido*, 503 U.S. __ 112, S. Ct. 1522 (1992), is directly applicable to this matter and resolves all issues. The second question is also inappropriate inasmuch as the Appellate Division of the State of New Jersey correctly found that the exhaustion doctrine was particularly applicable to the facts of this case under New Jersey Law.

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STATEMENT OF THE CASE

The Petitioner attempts to distinguish this case from *Yee v.*

City of Escondido, 503 U.S. __ 112, S. Ct. 1522 (1992) by asserting that under *Yee*, a cause of action may rise since Petitioner's land is zoned exclusively for mobile home parks.

The Petitioner's argue that the zoning ordinance is the mechanism which forces a landlord to continue use of his land by the tenants. They argue that this distinguishes the present case from that set forth in *Yee*.

Despite the fact of the presence of relief under the New Jersey Municipal Land Use Law from this zoning by application for "use variance", the Petitioner simply concludes it would be futile to apply for such variance. The Appellate Division found that there was no attempt by Petitioners to seek a change in the use of the property or that they even contemplated for economic reasons a change in the use of the land. Accordingly, no taking has occurred under the standards set forth in *Yee*. The Petitioner however, in blatantly conclusatory language, repeatedly asserts that to explore their remedies or exhaust their administrative appeals by filing for a variance would be futile. They also claim that the other New Jersey Statutes would also render their appeal futile.

There are simply no facts appearing in this record on which to base this conclusion.

The Jackson Township Rent Ordinance (Appendix J) has been reviewed by many courts including this Court and has been found to pass constitutional muster. *See, Joe Mayes v. Jackson Township*, 103 N.J. 362, 511 A.2d 589 (1986), *cert. denied*, 497 U.S. 1090, 107 S. Ct. 1300, 94 L. Ed. 2d 155 (1987).

The Jackson Township Rent Control Ordinance provides for a just and reasonable rate of return on the investment of the park owner.

To the best of the knowledge of the Township of Jackson, Southwind Mobile Home Park, owned by the Petitioner, has a history of being a viable economic entity and operation. The Township of Jackson is unaware of any action of the Petitioner to sell the park or change the use of the property. No application to the Jackson Township Zoning Board of Adjustment for a change in use or other relief from the zoning requirements has been filed by the Petitioner. In its decision, the Appellate Division reviewed *Yee* and found that the *Yee* case involved similar issues as to the combined effect of the California Mobile Home Residency Law and the City of Escondido's Municipal Rent Control Ordinance. (Appendix B, 8a).

The Appellate Division adopted the language of *Yee* and found that a physical taking, as opposed to a regulatory taking, exists only where the government "requires the landlord to submit to the physical occupation of his land" and accordingly absent that coercion, the Petitioner's argument was rejected by the Appellate Division. (Appendix B, 9a-11a).

Finally, the Appellate Division concluded that the argument by Petitioner to distinguish this case from *Yee* based on zoning requirements was rejected by the Court as follows:

> We decline to consider the merits of Plaintiff's argument. Plaintiff has not demonstrated any attempt to change the use of its land. See N.J.S.A. 40:55D-70D. We conclude that it would be wholly speculative to determine whether the untested circumstances require Plaintiff to perpetually use its property as a mobile home park. Even though Plaintiff might have difficulty changing the use of its property, the statutes and ordinance do not on their face

> preclude Plaintiff from discontinuing use of the land as a mobile home park.

(Appendix B, 13a).

It is respectfully submitted that the Appellate Division correctly characterized the status of the case and the failure of the Petitioner to draw any concrete distinction between the facts of this case and that set forth in *Yee*.

REASONS FOR DENYING THE WRIT

Any question regarding the relationship between the facts of this matter and those set forth in *Yee* were explained and disposed of by the Appellate Division of the State of New Jersey. The New Jersey Supreme Court refused to grant certification to further consider these arguments raised at the Appellate Division level.

There is simply no federal question or undecided issue with regard to the "exhaustion doctrine" as it applies to zoning relief in the State of New Jersey.

In cases where an ordinance is found to violate a constitutionally protected right on its face, injured parties may be entitled to damages and civil right suits under 42 U.S.C. § 1983. *See, Burlington Assembly of God v. Zoning Board,* 238 N.J. Super. 634 (Law Div. 1989). In this instance, the zoning ordinance is not alleged to be unconstitutional by the Petitioner; accordingly, the trial courts shoud ordinarily decline to adjudicate an attack on the ordinance until the owner has exhausted his variance remedy. *See, Deal Gardens, Inc. v. Board of Trustees of Loch Arbour,* 48 N.J. 492, 496-498 (1967), *Route 15 Associates v. Jefferson Township,* 187 N.J. Super. 481, 488-489 (App. Div. 1992). In this case, the Plaintiff is asserting that the zoning ordinance in combination with the Township of Jackson's rent control ordinance and various state

statutes work a taking. However, before such an argument could be presented, there must be an application or measure by the Petitioner to seek relief from the zoning restrictions prior to any claim for damages being actionable.

There are no outstanding or unresolved issues of law concerning physical taking aspects of mobile home rent control ordinances after *Yee*. Further, the exhaustion doctrine as it applies to variances or relief from zoning laws is well settled case law.

Accordingly, there are no special or important reasons as set forth under Rule 10 for granting this Writ of Certiorari.

I.

THE APPELLATE DIVISION OF THE NEW JERSEY SUPERIOR COURT PROPERLY APPLIED THE PRECEDENCE OF THE FEDERAL SUPREME COURT DECISIONS IN FINDING THAT THE PETITIONER HAD NOT SUFFERED A PHYSICAL TAKING ON THE BASIS OF STATE LAW AND LOCAL RENT CONTROL ZONING ORDINANCES.

It is clear from the Appellate Division's thoughtful analysis that these regulations do not add up to a taking and do not present any distinguishing circumstances from that set forth in *Yee*. The Petitioner asserts that this is the "different case" of which Justice O'Connor spoke in *Yee*.

> A different case would be presented where the statute, on its face or as applied, to compel a land owner over objection to rent his property or to refrain in perpetuity from terminating a tenancy.

Yee, 503 U.S. at __ 112, S. Ct. at 1528-1529.

The record is clear that the Petitioner has operated a mobile home park for many years and there are no facts to support a claim that they wish to change the use of the premises. Rather they assert via some abstract intellectual exercise that a taking has taken place in accordance with Justice O'Connor's language in *Yee*. This argument falls after a thorough review of the facts and the law as it now stands.

The Appellate Division correctly characterized and found without merit the Petitioner's argument that they must be excused from this exhaustion requirement because they obviously would not receive a variance. The exhaustion doctrine is a rule of substance that requires a party to seek relief from government regulation before filing for relief with the courts. (Appendix B, 13a).

In this case there is no "required acquiescence" to utilize Petitioner's property as a mobile home park. The park is apparently viable and the Petitioners are operating in accordance with state and local regulations. Notwithstanding the foregoing, the Petitioner argues that this is a different situation than *Yee*. At best their argument can be characterized as claiming a "distinction without difference". The State of California and the State of New Jersey have similar regulatory schemes as it affects rent control and zoning for land use. The Petitioner is guilty of the most gross speculation in claiming that an application for a change in use is an exercise in futility. New Jersey Case Law demonstrates that the exhaustion doctrine is there to protect judicial time and resources where there is no case or controversy. *Twenty-First Century v. D'Alessandro*, 257 N.J. Super. 320 (App. Div. 1992). Petitioner's specious reasoning further goes on to assert that they can only speculate on what type of use the property could be directed to. Presumably, the Petitioner, who is the owner of the property would

know or have a good idea as to what the highest and best use of the property would be. In any event, the Municipal Land Use Law has been interpreted by the highest court of the state and there has been thorough discussions involving the standards which must be met prior to the issuance of a use variance. *See, Burbridge v. Minehill Township,* 117 N.J. 376, 386-387 (1990) where the New Jersey Supreme Court thoroughly discussed and clarified the special reasons it takes to gain a use variance from a zoning ordinance. *See, also, Medici v. BPR Company,* 107 N.J. 1, 10, 18 (1987).

Moreover, the courts have recognized that special reasons for a use variance may be demonstrated by proof of undue hardship, that is, that the property at issue cannot reasonably be developed with a conforming use. *See, Medici v. BPR Company, supra.* Note .1 at page 4; *Burbridge v. Minehill Township, supra,* at 392-393.

There is no issue before this Court of an unresolved nature concerning the exhaustion of administrative remedies in the face of zoning ordinance restrictions.

It is recognized by the Appellate Division in their decision (Appendix B), that there is plainly no record on which to establish that any taking has occurred much less that any taking argument could be founded upon. Referring to the Constitution does not change the record that exists in this case. The record in this case was made at the trial level on vacancy decontrol founded upon law which has now been overturned and overruled by *Yee.* The Petitioner's Brief on the Petition recognizes the shortcomings but simply argues in conclusatory language that a taking has taken place and they should be heard. Nothing about the law or the record has changed since the trial level.

Finally, the Petitioner asserts that the Appellate Division, in effect, missed the nuance that the United States Supreme Court recognized, of the existence of a cause of action as founded in the

Yee decision. The fact of the matter is that the Appellate Division decision not only recognizes this Petitioner's argument on this Writ, but specifically addressed it and found that the *Yee* decision was on all fours in refuting Petitioner's argument. Petitioners pressed the argument despite the fact that the record in this case is inadequate to present the issue which this Petitioner wishes existed and is trying hard to present. However, simply stating that we cannot change the property or that to apply is futile does not provide sufficient basis for a cause of action much less a decision by this Court to grant the Writ. In the end, the decision which the Appellate Division made is all encompassing, addresses all the arguments presented and is in total accord not only with the United States Supreme Court decision in *Yee* but also New Jersey Case Law. *Matter of Plan for Orderly Withdrawals v. Twin City Fire Insurance Company,* 129 N.J. 389 (1992).

CONCLUSION

Based upon all the foregoing authorities, particularly under the controlling cases of *Yee*, the Mobile Home Village, Inc. Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ABRAHAM S. BIELORY
Counsel of Record
BABCOCK, HENNES & BIELORY, P.C.
Attorneys for Defendant-Respondent
Jackson Township Rent Control Board
2610 Yorktowne Boulevard
Brick, New Jersey 08723
(908) 255-6500

HIERING, HOFFMAN AND GANNON
Attorneys for Defendant-Respondent
Mayor and Council of the Township of
Jackson
29 Hadley Avenue
Toms River, New Jersey 08753
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